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Supreme Court, U.S.
FILED

No. 99526 SEP 14 1999

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Emanuel McCray,

Petitioner,

v.

United States National Labor Relations Board,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Emanuel McCray
Petitioner, Pro Se

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QUESTIONS PRESENTED FOR REVIEW

Title 5 U.S.C. 552a, hereinafter the Privacy Act, was enacted to safeguard and protect an individual's constitutional right of privacy against a federal agency's invasion by regulating the collection, maintenance, use and dissemination of information about an individual. Without Petitioner's knowledge or consent, Petitioner's private data was collected, used and disseminated and is currently being maintained indefinitely. The questions presented for review are:

1. Whether the articulated purposes of the Privacy Act was intended by the Congress to encompass a government agency's collection of an individual's private information in order to adjudicate that individual's statutory right to vote; and,

2. If so, whether the government agency is subject to civil suit for any damages which occur as a result of willful or intentional action that deprives, burdens or violates the individual's rights created under this statute.

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5 U.S.C. §552a(e)
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Miscellaneous

Preamble, Privacy Act of 1974, Public Law 93-579; 88 STAT. 1896 [S. 3418], p2177

Senate Report No. 93-1183, [S.3418], 1974, p6916

120th Congressional Record - Senate, 12/17/74 p40408

Emanuel McCray, the Petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The June 1997 opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is unpublished and is reprinted in the Appendix to this Petition at pages 1-2. The prior opinion of the District Court for the Southern District of California is also unpublished and reprinted in the Appendix to this Petition at pages 3-22.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1999 (Appendix A, at page 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and historical provisions, cited at page iii, *supra*, are reprinted in Appendix D and E to this Petition at pages 26-35.

STATEMENT OF THE CASE

This case is without precedence and was brought by Petitioner in the Federal District Court, Southern District of California. Petitioner alleged the NLRB violated the

intent and purposes of the Privacy Act when the NLRB collected, used and disseminated his private data without his knowledge and consent. The most complicated issue in this case is the due process of law advanced by the Congress when enacting the Privacy Act.

On or about March 1997, the NLRB collected the names and addresses of 306 individuals in order to adjudicate these individuals statutory right to vote. This is a practice that has been established since at least 1935 when the NLRB was continued as an agency of the Federal Government.[1] On April 9, 1997 the NLRB used this list to judge the eligibility of the individuals arriving to exercise their right created by statute.

The NLRB denied maintaining a "system of records" as defined by the Privacy Act, and further contended that the information the agency collected was "not about Plaintiff" or of the "type protected by the Act."

Petitioner contended that: (1) citations averred by the NLRB and the District Court were inapposite to the facts at bar; and that (2) the Privacy Act's legislative history supported not only Petitioner's viable legal theory, but also the interpretation of the face of the statute. Any omissions under the Privacy Act, it was contended by Petitioner, amounted to violations of the Privacy Act.

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[1] 29 U.S.C. 153(a)

The District Court ruled that in order for the Privacy Act to apply to Petitioner's claims, a system of records was required, while adding to the court's ruling that: "it is doubtful that McCray's claims are cognizable under the Privacy Act. The court, however, need not determine the scope of the Privacy Act's applicability because it concludes that McCray failed to raise a triable issue of material fact concerning essential elements of his Privacy Act claims."[2]

Following the Court of Appeals for the Ninth Circuit ruling in *Baker v. Department of Navy*, the District Court further held that "[i]n enacting the Privacy Act, Congress was primarily concerned with the potential misuse of personally-identifiable information stored in computers." "While the Act certainly applies to manually-retrieved information, Congress was concerned about the ability of federal agencies to retrieve information about individuals through their computer systems using personal identifiers."

REASONS FOR GRANTING THE PETITION

Based upon the asserted facts, this Court has not heretofore considered the question of importance presented herein. The issue of due process of law is at its zenith when a government agency takes, deprives or burdens rights created by statute.

The rulings below, on their face, would tend to sanction the NLRB's agency action by

[2] Appendix at page 10.

way of a grant of de facto police power or entitlement by way of proscription. Furthermore, the rulings below would: (1) pave the way for other Government agencies to sidestep the Privacy Act by refusing to maintain a "system of records" or denying the existence of such; and (2) remove the safeguards and protection currently applied to the paper and manual files and systems of other Government agencies such as the Internal Revenue Service, Federal Bureau of Investigation and the U.S. Military.

I. National Importance.

The fundamental right of liberty, privacy and due process of law protected under the Federal Constitution are incorporated into the Privacy Act. These rights are evident in the Preamble to the Privacy Act. It was the Congress' intent to avoid constitutional questions and issues of due process when enacting the Privacy Act.

Since 1935, the NLRB has been collecting information about individuals. In 1997, e.g., the NLRB collected the private data of more than 217,000 individuals. During 1998, more than 228,000 individuals were affected by the collection activity. Over the years, therefore, the NLRB has encroached upon the privacy rights of millions of Americans.

II. Liability of the United States.

The civil remedies sections[3] of the Privacy Act creates Government liability for a failure to "comply with any other provision of this section..." and establishes liability "to the individual in an amount equal to the sum of... actual damages but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court."

Given the number of individuals affected yearly by the NLRB's agency action, the damages alone could amount to millions of dollars.

III. Incorrectness of the decision below involves an important question of statutory construction.

Concomitant a statutory need to collect information about an individual is the duty to safeguard and protect the information once it is collected. The Privacy Act incorporated these measures by requiring a "system of records" be maintained by Government agencies.

The District Court's view of *Excelsior Underwear,*[4] and *Wyman-Gordon*[5] is somewhat misplaced and was used extensively to reach its conclusion. "*Excelsior*" involved the unions' need to have access to employee data which the NLRB upheld and required employers to disclose. Moreover, this Court's ruling in *Wyman-Gordon* and the NLRB's *Excelsior* ruling

[3] 552a(g)(1)(D) and 552a(g)(4)
[4] 156 NLRB 1236 (1966)
[5] 394 U.S. 759 (1969)

were not issues presented below for the court's consideration and the court's ruling as such would amount to a miscarriage of justice. This case was narrowly presented before the courts below and focused solely on the information the NLRB had been collecting for its own internal use since at least 1935. The case at bar below was not about the NLRB's order requiring the disclosure of certain information to the unions.

The District Court view of this Court's ruling in *DOD V. FLRA*[6] is likewise misplaced. This Court holding that "unlike private sector employees, Federal employees enjoy the protection of the Privacy Act. . .," was used to reflect the fact that private sector employers cannot refuse a disclosure order of the NLRB by citing the "system of records" provision of the Privacy Act. Hence, this Court did not hold that any information collected in the private sector is exempt from the coverage of the Privacy Act.

The courts' reliance upon a "system of records" being computerized in order to invoke the Act's provisions is erroneous and inconsistent with Congressional intent for the following reasons: (1) Lack of notice and due process burdens the Act's due process clauses; and (2) Narrow, rather than broad interpretation defeats the scope of the Act's applicability.

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[6] 510 U.S. 487, 503 (1994). Reprinted in Appendix at page 9.

The intent to protect all systems and types of information, whether automated or manual, is evident throughout S.3418.[7] Congress could have used the modifier "electronic", "automated," "computerized," etc., to define a "system of records," but it did not do so. Support for this conclusion can be drawn from other sections of the Act specifically addressing computerized files.[8]

It was advanced by Petitioner that it was also intended by the legislators that the phrase "some identifying number, symbol, or other identifying particular assigned to the individual" would encompass the NLRB's assignment of an NLRB case file number, name of the employer, or other cross reference to the file created by the NLRB. S.3418 supports this interpretation.[9]

IV. Existence of Conflict in Principle Among the Lower Courts

Nearly all of the courts reviewed would appear to rule that the information must be computerized or retrieved from a computer in order to invoke the Act's applicability.[10] Such

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[7] Pertinent citations reprinted in Apendix E, pages 29-35, Cites 1,5, and 16-18.

[8] See Appendix D, Cites 4 and 9, pages 27 and 28.

[9] See Appendix E, Cites 15, 18 and 19, pages 33-35.

[10] *BAKER v. DEPARTMENT OF NAVY*, 814 F.2d 1381 (9th Cir. 1987); *BARTEL v. F.A.A.725 F.2d 1403*, (D.C.Cir 1984); *DOYLE v. BEHAN*, 670 F.2d 535 (5th Cir. 1982); *HENKE v. U.S. DEPT. OF COMMERCE*, 83 F.3d 1453 (D.C. Cir. 1996) *PIPPINGER v. RUBIN*, 129 F.3d 519; (10th Cir. 1997) *SAVARESE v. UNITED STATES DEPT. OF HEALTH*, 479 F.Supp. 304 (N.D. Ga. 1979); and *WILBORN v. DEPARTMENT OF H.H.S.*, 49 F.3d 597 (9th Cir. 1995)

a narrow view would strain the "broad interpretability" to be given the Privacy Act.

The opinions are varied regarding the "retrieval" rule, yet they all fail to address a compelling purpose--the statutory need to collect information about an individual and the concomitant duty associated with this declaration. The list of voters is solely created to adjudicate the rights of the individuals appearing thereon. Hence, the list "*is retrieved* " only to resolve questions regarding the individuals. Given this explicit purpose, the court in *Henke v. Department of Commerce*[11] could probably be seen as ruling in Petitioner's favor.

Petitioner contends that the primary controlling feature of the Privacy Act rests with the agency's declaration of a statutory need to collect information about an individual. The requirement that a "system of records" be maintained was ancillary to this need and was intended by the Congress to safeguard and protect information collected about individuals to meet a statutory purpose of the agency.[12]

Petitioner's private data was, as was the data of the other individuals, collected to

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[11] 83 F.3d 1453,1461 (D.C. Cir. 1996) [agency cannot simply refuse to acknowledge that it maintains a system of records and thereby insulate itself from the reach of the Privacy Act; the mere fact that the agency has not acknowledged that it operates a system of records will not protect it from the statutory consequences of its actions.]

[12] See Appendix E, Cites 7-10, pages 31-32.

meet a direct and immediate statutory need of the NLRB. The information was used to adjudicate the eligibility of individuals participating in a government program. To the greatest extent practicable, the Privacy Act required this information to be collected from the individual.[13]

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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September 14, 1999

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[13] 5 U.S.C. 552a(e)(2), reprinted in Appendix at page 27, Cite 6.

APPENDIX A

[page1]NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMANUEL MCCRAY,

Plaintiff-Appellant,

V.

U.S. NATIONAL LABOR RELATIONS BOARD, Region 21, San Diego, California; NATIONAL LABOR RELATIONS BOARD, National Office, Washington, D.C.; TEAMSTERS LOCAL NO. 542, San Diego, California,

Defendants-Appellees.

F I L E D

JUN 17 1999

Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 98-56191

D.C. No. CV-97-02340-MLH

MEMORANDUM**[fn1]**

Appeal from the United States District Court for the Southern District of California Marilyn L. Huff, Chief Judge, Presiding

APPENDIX A

Submitted June 14, 1999**[fn2]**

Before: O'SCANNLAIN, RYMER, and SILVERMAN, Circuit Judges.

[page2]Emanuel McCray appeals pro se the district court's entry of summary judgment on his claims under the Privacy Act, 42 U.S.C. § 1983, and the denial of his request for injunctive relief, arising out of the National Labor Relations Board's collection and dissemination of information. We have jurisdiction under 28 U.S.C. § 129 1. We review de novo the district court's grant of summary judgment, *see Baker v. Department ofNavy,* 814 F.2d 1381, 1382 (9th Cir. 1987), and we affirm for the reasons stated by the district court in its June 10, 1998 order. AFFIRMED.

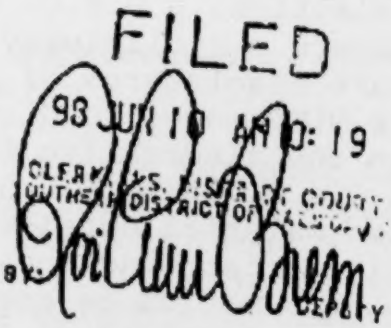
[Footnotes]

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX B

[page1]



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EMANUEL MC CRAY, Plaintiff,
v.

RESIDENT OFFICE, REGION 21, U.S. NATIONAL LABOR RELATIONS BOARD, SAN DIEGO, CALIFORNIA, and DOES 1 through 5, Defendants.

CASE NO. 97-CV-2340 H (JFS)

Order Granting Defendant's Motion For Summary Judgment; Denying As Moot Defendant's Motion To Dismiss; Denying As Moot Plaintiffs Application For Preliminary Injunction; Entering Judgment In Defendant's Favor

Plaintiff Emanuel McCray, proceeding pro se, filed a complaint alleging that the

National Labor Relations Board (NLRB) and unnamed employees of the NLRB wrongfully disclosed his name, address, and employee number in connection with a union representative election. 5 U.S.C. § 552a *et seq.* McCray requests a preliminary injunction to prohibit future disclosures of this information. The NLRB moves to dismiss McCray's complaint, or in the alternative for summary judgment. Fed.R.Civ.P. 12(b)(6), 56(c). The parties submitted material outside the pleadings in this matter, and the court construes the NLRB's motion as one for summary judgment. Anderson v.Angelone, 86 F.3d 932, 934 (9th Cir. 1996). Having reviewed the papers submitted and the law, the court grants the NLRB's motion for summary judgment on McCray's first amended complaint and enters judgment In the NLRB's favor. Accordingly, the court denies as moot McCray's application for a preliminary injunction and the NLRB's motion to dismiss.

[page2]BACKGROUND

In February 1997, Local 524, Teamsters, Chauffeurs, Warehouseman & Helpers, International Brotherhood of Teamsters, AFL-CIO (the Union) filed a petition with the NLRB to represent certain employees at Cloud 9 Shuttle, Inc. (Cloud 9), which employs McCray. Cloud 9 operates shuttles to the San Diego airport. The NLRB's San Diego Resident Office determined that the Union satisfied the election requirements and scheduled a representative election for April 9, 1997. Steven Sorensen, Resident Officer for Region 21, was responsible for the Cloud 9 election. The case was assigned the name "Cloud 9

Shuttle" and case number 21-RC-19756. The election would determine whether a majority of the employees in the bargaining unit at Cloud 9, which includes drivers and reservationists, wished to be represented by the Union. *(Sorensen Declar., Ex. 1).*

Pursuant to the National Labor Relations Act (NLRA) and Supreme Court precedent interpreting the Act, Cloud 9 furnished the NLRB with a list of the names and addresses of the employees eligible to vote in the representation election (the Excelsior list). 29 U.S.C. § 159. The list is fifty-eight pages long and includes the names of over 300 employees. (Id., 15). McCray's name, address, and employee number appear on page thirty-four of the list Excelsior information). (Id.). On April 9, 1997, the NLRB conducted the election, which the Union lost. (Id., ~ 7, *Ex. 3).* McCray alleges that the Union contacted him on two occasions prior to the election.

On March 23, 1998, McCray filed the first amended complaint, which alleges that the NLRB collected and disclosed his name and address in violation of several provisions of the Privacy Act.of. 1974, 5 U.S.C. § 552a *et seq.*, and certain of his constitutional rights. On March 30, 1998, McCray filed a motion for preliminary injunction to enjoin the NLRB from making future disclosures of his Excelsior information. McCray did not properly serve process on the NLRB, and this court denied without prejudice McCray's motion on April 22, 1998. On May 4, 1998, McCray filed his renewed motion for preliminary injunction. On

May 8, 1998, the NLRB moved for summary judgment on McCray's first amended complaint.

DISCUSSION

A. The NLRB's Motion For Summary Judgment

McCray's claims in the first amended complaint arise from the NLRB rule requiring Cloud 9 **[page3]** to furnish the Excelsior list to the Union prior to the representation election. McCray alleges that the NLRB rule violated his rights under § 552a(b), § 552a(e)(2), and § 552a(e)(3) of the Privacy Act. McCray also claims that this rule violated certain of his constitutional rights and requests that the five unnamed officers and employees of the NLRB in the San Diego Resident Office be found guilty of misdemeanors pursuant to 5 U.S.C. § 552a(i)(1)&(2). The NLRB moves for summary judgment on each of McCray's causes of action in the first amended complaint.

A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). The moving party bears the initial burden of informing the court of the basis for its motion and identifying those portions of the file which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). There is

"no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Id.(emphasis in original).

The opposing party cannot rest on the mere allegations or denials of his pleading, but must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial."' Id. at 324. (citation omitted). The opposing party may not rely solely on conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). "The mere existence of a scintilla of evidence in support of the plaintiff s position will be insufficient [to defeat summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). In making this determination, the court must examine the evidence in the light most favorable to the non-moving party. United States v._ Diebold-, Inc., **369 U.S. 654, 655 (1962).** Any doubt as to the existence of any issue of material fact

requires denial of the motion. Anderson, 477 U.S. at 255. **[page4]**1. Causes of Action Pursuant to the Privacy Act

McCray asserts three claims under the Privacy Act based on the NLRB's Excelsior rule. Section 9 of the NLRA authorizes the NLRB to conduct representative elections to determine whether employees within a bargaining unit at the company "elect" the union to represent them for purposes of collective bargaining. 29 U.S.C. § 159. Before holding the election, the NLRB requires the employer to furnish an Excelsior list, which contains the names and addresses of the employees who are eligible to vote in the election. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); see also North Macon Health Care Facility, 315 NLRB 359 (1994). Within seven days of the notice of the election, the employer is required to submit the Excelsior list to the Regional Director. Id. The NLRB then provides the union involved in the election with the list.

The Supreme Court and Ninth Circuit have upheld and approved the NLRB rule requiring private employers to furnish Excelsior lists prior to representation elections. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v All-Weather Architectural Aluminum, Inc., 692 F.2d 76, 78-79 (9th Cir. 1982). The Excelsior rule promotes the employees' free and fair choice of bargaining representative: "The purpose of the rule is to provide employees with the opportunity to vote for or against representation under circumstances that are

free from interference, restraint, coercion, or other elements likely to impede a free and reasonable choice." All-Weather Architectural Aluminum, Inc., 692 F.2d at 78; (see also Wyman-Gordon, Co., 394 U.S. at 767 (disclosure requirement furthers employees' free choice of bargaining representative "by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses."). Where the employer refuses to comply with the Excelsior rule, the NLRB has the authority to issue a subpoena to obtain the list. Wyman-Gordon Co., 394 U.S. 759. Courts have recognized the NLRB's authority to compel the production of employee address lists even though unions representing public employees do not enjoy the same access to this information. United States Dept. of Defense v. FLRA, 510 U.S. 487, 503 (1994) unlike private sector employees, Federal employees enjoy the protection of the Privacy Act. . ."); see also United States Dept.of Defense, 510 U.S. at 506 (recognizing authority of NLRB to compel production of Fxcelsior list and other employee information related to collective bargaining in the private sector) (Ginsburg, L, concurring in **[page5]** judgment); FLRA v. United States Dept. of Treasury Financial Management Service, 884 F.2d 1446, 1457-1458 (D.C. Cir. 1989) (Ginsburg, J., concurring).

The court appreciates McCray's desire for privacy in his home and to prevent disclosure of his address to the Union. He has not presented any authority, however, which recognizes a claim under the Privacy Act based on the NLRB's requirement that private sector

employers produce Excelsior lists. The duty of the district court is to decide cases based on existing precedent. In light of longstanding precedent approving the Excelsior rule and the absence of authority supporting his position, it is doubtful that McCray's claims are cognizable under the Privacy Act. The court, however, need not determine the scope of the Privacy Act's applicability because it concludes that McCray failed to raise a triable issue of material fact concerning essential elements of his Privacy Act claims.

The NLRB argues, among other things, that McCray failed to raise a genuine issue of material fact with respect to whether his "record" (name, address, and employment number) is contained within a "system of records." Because the applicability of the Privacy Act depends on this issue, the NLRB maintains that it is entitled to summary judgment on these claims. The court agrees with the NLRB.

The Privacy Act, the counterpart to the Freedom of Information Act (FOIA), governs the disclosure, collection, and maintenance of information about individuals by the federal agencies. 5 U.S.C. § 552a. The Privacy Act applies to "records" (information about an individual) kept by the agency within a "system of records."**[fn1]** Section 552a(a)(5) defines a "system of records" as ... a . group of any records under the control of any agency from *which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying*

particular assigned to the individual. 5 U.S.C. § 552a(a)(5) (emphasis added).The definition of "system of records" makes coverage under the Privacy Act turn on the retrievability of the "record." Baker v. Department of Navy, 814 F.2d 1381, 1382 (9th Cir.), cert. **[page6]** denied, 484 U.S. 963 (1987). For the protections of the Privacy Act to apply, an individual's "record" must be retrieved or retrievable by the name or some other identifying characteristic assigned to that individual. NLRB v. North Bay Plumbing, Inc., 102 F.3d 1005, 1009 (9th Cir. 1996) ("The Privacy Act's prohibition against disclosure does not apply to information that is not retrievable by name or other individual identifier."); Baker, 814 F.2d at 1382; Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (1 9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) (even though plaintiff s "record" was found by defendant, it was not kept in a "system of records" because it could -only be retrieved by searching through a file not keyed to any identifying characteristic of plaintiff); Gibbs v. Brady, 773 F. Supp. 454, 458 (D.D.C. 199 1). Accordingly, to assert a claim under the Privacy Act, the plaintiff must show that the agency retrieved or could retrieve his "record" or personal information by keying his name or other identifying attribute. Id. The definition of "system of records" reflects the privacy issues that the Privacy Act was drafted to address. In enacting the Privacy Act, Congress was primarily concerned with the potential misuse of personally-identifiable information stored in computers. Baker, 814 F.2d at 1384 (citation to legislative history omitted). While the Act

certainly applies to manually retrieved information, Congress was concerned about the ability of federal agencies to retrieve information about individuals through their computer systems using personal identifiers. Id. For these reasons, the definition of "system of records" makes coverage under the Act turn on the method of retrieval of a "record" rather than its substantive content. Id.; 5 U.S.C. § 552a(a)(5).

McCray asserts three causes of action against the NLRB pursuant to § 552a(b), § 552a(e)(2), and § 552a(e)(3) of the Privacy Act. McCray claims that his name, address, and employee number, which are included on the Excelsior list that Cloud 9 furnished to the Union, constitute a "record" pursuant to 5 U.S.C. § 552a(a)(4)**[fn2]**. McCray further alleges that this "record" is contained within a "system of records" maintained by the NLRB. As explained below, this allegation is an essential element of each of his Privacy Act causes of action.

McCray's first claim alleges that the NLRB violated the disclosure provisions of § 552a(b) by providing the Excelsior list to the Union without following the required notice procedures. Section **[page7]** 552a(b) governs the disclosure of "records" contained in a "system of records": No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whomthe record perains…. To state a claim pursuant to § 552a(b), the plaintiff, among other things,

must allege that the information at issue is a "record" contained in a "system of records." Quinn v. Stone, 978 F.2d 1 26, 131 (3d Cir. 1992). Thus, an essential element of McCray's disclosure claim is that his name, address, and employee number are kept within a "system of records" maintained by the NLRB. North Bay Plumbing, Tnc,, 102 F.3d at 1009; Baker, 814 F.2d at 1382

McCray's second and third causes of action are based on § 552a(e). In his second claim, McCray alleges that the NLRB failed to collect the Excelsior information "to the greatest extent practicable" directly from him as required by § 552a(e)(2). Section 552a(e)(2) requires each "agency that maintains a system of records" to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. 5 U.S.C. § 552a(e). By its express terms, § 552a(e)(2) applies only to information for which the NLRB "maintains a system of records." 5 U.S.C. § 552a(e). Thus, the information at issue, McCray's name, address, and employee number, must be kept in a "system of records" maintained by the NLRB for this provision to apply. 5 U.S.C. § 552a(e); Baker, 814 F.2d at 1382; see also Boyd, 709 F.2d at 686; Tobey v. NLRB., 40 F.3d 469 (D.C. Cir. 1994).

In his third claim, McCray alleges that the NLRB failed to provide him with the requisite disclosures with respect to the'Excelsior information as required by § 552a(e)(3).**[fn4]** Section 552a(e)(3) sets forth the disclosures an agency is required to make when collecting

information from an individual. An agency that maintains a "system of records" must

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation o the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information.

5 U.S.C. § 552a(e)(3). Like § 552a(e)(2), § 552a(e)(3) applies only to McCray's informati for which the NLRB "maintains a system of records." 5 U.S.C. § 552a(e). Thus, McCray's Excelsior information must be contained in a "system of records" for this provision to apply. 5 U.S.C.`§ 552a(e); see Baker, 814 F.2 at 1382; see also Boyd, 709 F.2d at 686; Tobe 40 F.3d 469. For the above reasons, it is cle that whether McCray's name, address, and employee number are contained within a "syste

of records" is an essential element of each of these three causes of action.

As the party bearing the burden of proof on the system of records element, McCray must raise a triable issue of material fact regarding this issue to survive summary judgment. Anderson, 477 U.S. 242. Having reviewed the materials submitted in this matter, the court concludes that there is no **[page9]** disputed fact with respect to whether McCray's Excelsior information was retrieved or is retrievable using his name or other identifying characteristic.

The San Diego Resident Office follows a standard procedure when a union files a representation petition. The Resident Office assigns a case name and number to the petition. *(Sorensen Declar.,* [Id. at] *9*). The case is filed in a cabinet by case number and type of case, and the case files are indexed by case number and name of employer. (Id.,[at] 10). The original Excelsior list is placed in the case file. (Id., [at] 9). Case files are never filed or indexed and cannot be retrieved by the name or any identifying characteristic of individual employees included on the Fxcelsior list. (Id).

In this case, Steven Sorensen, the Resident Officer for Region 21, which includes San Diego, was responsible for the Cloud 9 representation petition. The Resident Office assigned the name "Cloud 9 Shuttle" to this petition and the case number 21-RC-19756. (Id., [at] 3). The Excelsior list furnished by Cloud 9 is fifty-eight pages in length and

includes the names of over 300 employees. (Id., [at] 5). McCray's name, address, and employee number appear on page thirty-four of the list. (Id.). The Excelsior list, along with other documents pertaining to the Cloud 9 petition, are kept in the case file, which is approximately one-inch thick. (Id., [at] 8). Mr. Sorensen declares that the case file and 'Excelsior list for the Cloud 9 petition have never been retrieved and cannot be retrieved by McCray's name or any other identifier. (Id.,[at] 11). To obtain the Excelsior list for this litigation, Mr. Sorensen searched the file cabinet for the Cloud 9 case file by checking the files in the approximate time period in which the petition was filed. (Id.). McCray does not present evidence to challenge the factual statements in Mr. Sorensen's declaration, but instead argues that these facts demonstrate violations of the Privacy Act.

Based on this undisputed evidence, it is clear that McCray's Excelsior information is not contained within a "system of records." To retrieve the Excelsior list containing McCray's name and address, the NLRB is required to manually search for the case name ("Cloud 9 Shuttle"), the case number (21-RC-19756), or approximate date of the Cloud 9 petition. Neither the Cloud 9 case file nor the Excelsior list is keyed to McCray's personal identifier. McCray's name is one of hundreds on the list, and the list is only one of many documents in the file. In light of this evidence, it is beyond question

that McCray's Excelsior information is not retrievable and was not retrieved by his name or **[page10]** any other personal identifier. North Bay Plumbing, Inc., 102 F.3d at 1009; Baker, 814 F.2d at 1382; BDyd, 709 F.2d at 686. Because McCray's "record" is not kept within a "system of records," the court grants the NLRB's motion for summary judgment on his Privacy Act causes of action.

2. Privacy Act and Employees and Officers of the NLRB

In addition to the NLRB, McCray sued five unnamed NLRB officers and employees at the San Diego Resident Office. *(Amended Compl.*, [at] 4). By the express terms of the Privacy Act, McCray may only bring suit against an agency. 5 U.S.C. § 552a(g)(1)(D) (whenever an agency fails to comply with the provisions of the Privacy Act, an "individual may bring a civil action against the agency"); Unt v. Aerospace Corp, 765 F.2d 1440, 1447-48 (9th Cir. 1985). For purposes of the Privacy Act, an agency does not include the agency's employees. 5 U.S.C. §§ 552(f), 551(1). The fact that McCray may not maintain a lawsuit against employees of the NLRB provides an independent ground to enter summary judgment in their favor on McCray's Privacy Act claims.

The court also dismisses McCray's request to impose criminal penalties on these five unnamed defendants for allegedly violating §§ 552a(i)(1)&(2). The United States Attorney for this district, not civil litigants, prosecutes criminal offenses against the United States. 28 U.S.C. 547(1). For these reasons, the court

enters judgment in favor of these unnamed defendants on these claims against them.

3. Excelsior List and Constitutional Rights

In addition to the claims under the Privacy Act, McCray also alleges that his rights to privacy and seclusion and right to be free from unreasonable seizures were violated by the collection and disclosure of the Excelsior information. McCray's allegation that the Union contacted him on two separate occasions after the NLRB obtained the Excelsior list, even if true, does not constitute any constitutional violation. The NLRB rule requiring employers to furnish Excelsior lists to unions is well-settled. NIRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v. All-Weather Architectural Aluminum., Inc., 692 F.2d 76, 78-79 (9th Cir. 1982). Courts have long held that an employee's constitutional rights are not violated by the collecting or furnishing of the Excelsior list or any union contacts facilitated by the Est. NLRB v. J. P. Stevens & CO.) 409 F.2d 1207, 1209 (4th Cir. 1969) (any inconvenience caused by telephone calls or visits to employees' homes is far outweighed by the public interest in an informed electorate); NLRB v. Tanner Motor Livery Ltd., 419 F.2d 216, 220-221 n-5 **[page11]** (9th Cir. 1969); NLRB v. British Auto Parts, 266 F. Supp. 368, 373 (C.D. Cal. 1967), aff1d, 405 F.2d 1182 (9th Cir. 1968) (clear that neither right to privacy nor association is invaded by the Excf~ rule). Because there is no legal basis for McCray's constitutional claims, the court grants the NLRB's motion for summary judgment on these claims.

B. Injunctive Relief

APPENDIX B

By granting the NLRB's motion for summary judgment on McCray's first amended complaint, the court renders moot his application for preliminary injunction. As an independent ground to deny McCray's motion, the court notes that the Privacy Act does not authorize injunctive relief under the circumstances of this case.

McCray seeks injunction relief to prevent the NLRB from repeating its allegedly unlawful acts, which include disclosing his Excelsior information to the Union; failing to obtain this information directly from him; and failing to provide the required disclosures concerning this information. 5 U.S.C. §§ 552a(b), (e)(2)&(3). The Privacy Act's remedial section provides specific remedial provisions for enumerated statutory violations. The Act authorizes injunctive relief for two kinds of unlawfully conduct, violations of certain provisions of § 552a(d), and only monetary damages for the remaining violations. 5 U.S.C. §§ 552a(g)(2)(A), (3)(A), (4). In interpreting these remedial provisions, the Ninth Circuit held that because the statute provides specific remedies for enumerated kinds of misconduct, these specified remedies are exclusive. Cell Associates v. National Institutes of Health, 579 F.2d 1155, 1157-62 (9th Cir. 1978); see also Commodity Futures Trading Comm. v. Co. Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982). Thus, a plaintiff may not obtain injunctive relief where the Act fails to provide for it. McCray's three Privacy Act claims arise under the catch-all remedial

provisions of § 552a(g)(1)(D) and do not involve misconduct for which the Act

authorizes injunctive relief. Because the Privacy Act does not authorize the injunctive relief McCray requests, the court denies his application for preliminary injunction. **[fn5]**

[page12] CONCLUSION

Plaintiff Emanuel McCray, proceeding pro *se*, filed a complaint alleging that the National Labor Relations Board and unnamed employees of the NLRB wrongfully disclosed his name, address, and employee number in connection with a union representative election. 5 U.S.C. § 552a *et seq.* McCray requested a preliminary injunction to prohibit future disclosures of this information. The NLRB moved for summary judgment on the first amended complaint. Fed.R.Civ.P. 56(c). The parties submitted material outside the pleadings in this matter, and the court construes the NLRB's motion as one for summary judgment. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). Having reviewed the papers submitted and the law', the court grants the NLRB's motion for summary judgment on McCray's first amended complaint and enters judgment in the NLRB's favor. Accordingly, the court denies as moot McCray's application for preliminary injunction and the NLRB's motion to dismiss.

IT IS SO ORDERED.

DATED: 6/19/98

APPENDIX B

/s/ MARILYN L. HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[Footnotes]

1. Section 552a(a)(4) defines the term "record" as ". . . any iten4 collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4).

2. For purposes of this order, the court need not determine whether McCray's Excelsior information constitutes a "record."

APPENDIX B

3. The NLRB also argues that it would be virtually impossible for it to collect the Excelsior information from McCray. Because the NLRB was not aware that McCray was an employee of Cloud 9 in the relevant bargaining unit for the representation election prior to receiving the Excelsior list, it could not obtain the required information from him. See Brune v. IRS, 861 F.2d 1284 (D.C. Cir. 1988). Under these circumstances, it is evident that the NLRB was not in the position to collect this information directly from McCray.

4. The NLRB also argues that § 552a(e)(3) is inapplicable in this case because it did not ask McCray "to Supply information7' for the Excelsior list and instead obtained this information from Cloud 9. *(Sorensen Declar.,* 114-6). McCray does not contest this point~ which provides an independent ground to enter summary judgment in the NLRB'S favor on this claim. See Covert v. Harrington, 76 F.2d 751, 755-56 (9th Cir. 1989).

5. The Privacy Act's remedial scheme renders moot McCray's request for injunctive relief pursuant to 42 U.S.C. § 1983. In any event, it is undisputed that the NLRB and its employees are federal authorities and that McCray may no assert a § 1983 claim against them. Billings v United States, 57 F.3d 797, 801 (9th Cir. 1995).

APPENDIX C

[page2177] PRIVACY ACT OF 1974
For Legislative History of Act, see p. 6916
PUBLIC LAW 93-579; 88 STAT.1896

An Act to amend title 5 United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Committee, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:
This Act may be cited as the "Privacy Act of 1974".

Sec. 2. (a) The Congress finds that--

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

[page2178] (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals..., it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to--

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him from obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by a specific statutory authority; and

(6) be subject to civil suit for any damages [that] occur as a result of willful or intentional action [that] violates any individual's rights under this Act.

APPENDIX D

SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

US Code as of: 01/05/99

Section 552a. **Records maintained on individuals**

Cite 1. 552a(a)(3) the term ''maintain'' includes maintain, collect, use, or disseminate;

Cite 2. 552a(4) the term ''record'' means any item, collection, or grouping of information about-an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

Cite 3. 552a(5) the term ''system of records'' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

Cite 4. 552a(8) the term ''matching program'' -

(A) means any computerized comparison of -

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of -

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

Cite 5. 552a(b) Conditions of Disclosure. - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

Cite 6. 552a(e) Agency Requirements. - Each agency that maintains a system of records shall -

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

Cite 7. 552a(g)(1) (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Cite 8. 552a(g)(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Cite 9. 552a(o) Matching Agreements. - (1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying...

APPENDIX E

A. Senate Report No. 93-1183 [S.3418] Legislative History P.L. 93-579, Privacy Act of 1974,:

Cite 1. "The purpose of S.3418, as amended, is to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use, and disclosure of personal information about individuals." "It is to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files." (Emphasis added) p6916

Cite 2. "It is designed to prevent ... the wrongful disclosure and use,... of personal files held by Federal agencies. " It is to prevent the secret gathering of information on people ...." "It is designed to set in motion for long-overdue evaluation of the needs of the Federal Government to acquire... information on Americans, by requiring stricter review within agencies of criteria for collection...." "It is also to promote observance of valued principles of fairness and individual privacy ...." p6916-6917

Cite 3. "The Committee is convinced that effective legislation must provide standards for and limitations on the information power of government. Providing a right of access and

challenge to records, while important, is not sufficient legislative solution to threats to privacy. Contrary to the views of Administration spokesmen it is not enough to tell agencies to gather and keep only data which is reliable by their rights for whatever they determine is their intended use, and then pit the individual against government, armed only with the power to inspect his file, and a right to challenge it in court if he has the resources and the will to do so. To leave the situation there is to shirk the duty of Congress to protect freedom from the incursions by the arbitrary exercise of the power of government and to provide for the fair and responsible use of that power." p6931

Cite 4. 'Privacy', then, is the shorthand term for the restraint on the power of government to... collect information... which has little or nothing to do with the purpose of government or of the agency involved, as their powers are defined by the Constitution and specific statutes. p6932

Cite 5. "As reported, the bill applies to Federal personal information systems, whether automated or manual, and to those of State, local and private organizations which are specifically created or substantially altered through grant, contract or agreement with Federal agencies, where the agency causes provisions of the [A]ct to be applied to such systems or files or relevant portions." p6932

Cite 6."Title II of S. 3418 sets general standards of fair records keeping which apply to practically all government files…." p6937

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Cite 7."Subsection 201(a). This subsection is the provision of the bill specifically directed to the constitutional and legal control of the invasion of individual privacy by government. "The section is to designed to insure that a Federal agency weighs strongly the rights of personal privacy against its authority and need to gather personal information for a public purpose." p6960

Cite 8."Subsection 201(a)(1). Provides that each Federal agency shall collect, solicit and maintain only such personal information as is relevant and necessary to accomplish a statutory purpose of the agency. This section, therefore, governs the first phase of the process which is the gathering of the information in the first place." "Second, it requires a decision that the collection of information of investigation of people along certain information lines is necessary in that the needs of the agency and goals of the program cannot reasonably be met through alternative means." p6961

Cite 9. "A third element in this decision process is the fact that the information which officials propose to collect must be maintained and integrated into the agency record-keeping system. Thus the decision on the relevance and need for certain gathering of information and investigating of citizens requires consideration of how that data will overlap or conflict with existing data banks and information programs of the agency." p6961

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Cite 10. "This section is designed to assure observance of basic principles of privacy and due process by requiring that where an agency delves into an area of privacy in the course of meeting government's needs, its actions may not be arbitrary, but rather, must be authorized, and found to be not only reasonable, but warranted by the overriding needs of society as the agency is responsible for administering to those needs." p6961

Cite 11. "Subsection 201 (a)(2). Provides that each Federal agency shall collect information to the greatest extent practicable directly from the subject where the information may result in adverse determinations about the individual's rights, benefits, and privileges under Federal programs." p6962

Cite 12."Many of the techniques involved in administrative and physical security would apply to tape central records rooms such as the card index of the Civil Service Commission, the manual finger-print file of the FBI, and the U.S. Army Records Center. p6980)

Cite 13. "This section is intended to apply to all personal information held by an agency, including administrative, statistical, and research data. It is intended to be a separate safeguard independent of any exemptions in the Act in order to carry out the principle that the individual should be put on notice whenever any agency official is put under judicial compulsion to surrender data, and to know whenever personal data will be put to uses unknown to the individual and not specified by the agency in its published notices." p6981

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Cite 14."Section 202 (a) prohibits the disclosure of information by a government agency. It:

"[p]rovides that no Federal agency shall disclose, transfer or disseminate personal files and information to any person, agency or private organization...." "In conjunction with subsection 201(a)(3), this section is intended to promote the informed consent of the individual to the uses to which government puts the personal data it collects or creates. It is thus expected to exert some check on excessive or illegal reach of governmental power over the individual,...." p6982

Cite 15. "The reference to personal characteristics did not exclude a file that contains only names and is headed by a general label for a category of records. If the heading or the nature of the file represents a judgment on the individual or a subjective view, then the file would be subject to the bill. A file headed 'security risks' or one labeled malingerers', or one coded for people to be dismissed at the earliest opportunity, even if the file only contained names, would be covered. This could, for instance, include a list of people who do not buy bonds, or do not contribute to charitable causes. Thus it could cover a list which contained names only but which, by nature, conveyed something detrimental to the reputation, rights, benefits or privileges or qualification of the individual simply by reason of being listed on it. " p6993

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Cite 16. "Rather than focus on a single record or subject file, the Committee has adopted an approach focused on the total information system which includes all phases of information collection, storage, handling, processing, dissemination and transfer. It includes records [that] are computerized, mechanized, microfilmed and photographed. p6993

Cite 17. The Bill seeks to cover "the overall programs and policies of executive branch departments and agencies including the design, development, and management of an information system, as well as to the maintenance of one particular file on an individual, or the gathering of information on one data subject," i.e., representation elections and the voters associated with these elections. p6993

Cite 18. "Given the broad scope of the bill, an alternative use of the term 'system of records' would create confusion as to its possible application to such things as inventories and extraneous matters. The use of the terms 'information system' and 'files' allows for distinctions where needed for the application of certain standards to an entire information system of an agency, department, or establishment, including its bureaus, offices, employees, and equipment, and for the application of them to a particular file, that is, a series of records on a particular subject." p6993-6994

Cite 19. [The term 'file'] "may mean an individual record or a series of records containing personal information about

individuals which may be maintained within an information system." The term 'data bank' "means a collection of files pertaining to individuals. Used in the bill, it connotes a recognizable entity for management purposes, specifically located within an agency or organization or to one of its components; it means a collection of files usually contributed to by different users and available to them according to a plan of access." p6994

120 Congressional Record - Senate, 12/17/74:

Cite 20. [The compromised definition of the term "record" was expanded "to assure the intent that a record can include as little as one descriptive item… and that such records may incorporate but not be limited to information about an individual's… employment…." "The amended definition was adopted to more closely reflect the definition of 'personal information' as used in the Senate bill." p40408